PROGRESS IN REFORM OF LEGAL PROCEDURE.

Ever since 1909, the Bar Associations of the State and of the City of New York have been engaged in considering what amendments to the New York Code of Civil Procedure were necessary to remove as far as possible by legislation the evils of unreasonable delay and expense in the determination by the courts of controversies between citizens. We recognized that delay of justice was often a denial of justice, and that it was desirable to terminate in one trial the litigation upon questions of fact, leaving the decision upon questions of law, arising upon the facts, to more deliberate consideration by the court of first instance and by the appellate tribunals.

The Constitution of the State of New York has organized our courts so that all questions of fact are to be decided finally in the Supreme Court.

"* * * the jurisdiction of the Court of Appeals except where the judgment is of death, shall be limited to the review of questions of law. * * *"[1]

When David Dudley Field drew the original Code of Procedure of 1848, he provided that the writ of error should be abolished and that review should be by appeal. It was his intention to give to the appellate courts the same power to render final judgment upon the record that the Chancellor had upon appeal. The General Term of the New York Superior Court held that it had this power in a common law action.[2]

But unfortunately the Court of Appeals took a more narrow view of the subject, and held in *Griffin* v. *Marquardt,* reversing the General Term of the Supreme Court in the First District, that final judgment should only be entered

"where it is entirely plain, either from the pleadings or from the very nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit."[3]

This was an equity case.

The evils resulting from this decision were great. New trials were multiplied both in common law and equity cases. The Court

[1]Art. 6, § 9.

[2]Astor *v.* L'Amoreaux (1851) 4 Sandf. 524, reversed (1853) 8 N. Y. 107.

[3](1858) 17 N. Y. 28, 33.

of Appeals discovered these evils and pointed them out with regret that it was "powerless to redress." In *Walters* v. *Syracuse R. T. Co.*, the court said:

"Moreover, it frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal. It often happens that his testimony upon the second trial is directly contrary to his testimony on the first trial, and when it is apparent that it was done to meet the decision on appeal the temptation to hold that the second story was false is almost irresistible."[4]

Yet the Court held it had no power to do justice in such a case.

During Mr. Field's life time he and Judge Dillon made a vigorous attempt to remedy these evils and in a report to the American Bar Association presented in 1885,[5] recommended that appellate courts should have power to render final judgment. Unfortunately, no attention was paid to this recommendation. The evil had been aggravated by the Throop Code, which in 1880 took away from the General Term and the Court of Appeals the power, which they had previously possessed, to examine the whole case upon appeals from the Surrogate's Court, both upon the facts and the law, and to render final judgment upon the merits.[6]

The evils which have been referred to increased with the increase of litigation. Justices Ingraham, Scott and Freedman of the First Department, and Justice Hirschberg of the Second Department, pointed them out before the Commission on the Laws Delay.[7] The author of this paper called attention to them in an article published in this Review;[8] he read a paper on the same subject before the State Bar Association in 1909[9] and it was referred by that Association to its Committee on Law Reform. Judge Rodenbeck read an admirable paper on the same subject before the Association in 1911.[10] It had meanwhile been under consideration by the Committee on Law Reform of the Bar As-

[4](1904) 178 N. Y. 50, 53.

[5]8 Proceedings American Bar Association 323, 337.

[6]Robinson *v.* Raynor (1864) 28 N. Y. 494, 497; Gardiner *v.* Gardiner (1865) 34 N. Y. 155, 164; Burger *v.* Burger (1888) 111 N. Y. 523, 526-7; Clapp *v.* Fullerton (1866) 34 N. Y. 190, 195-6; Schenck *v.* Dart (1860) 22 N. Y. 420, 422-3; Devin *v.* Patchin (1863) 26 N. Y., 441, 445-8.

[7]Report of Commission on Laws Delay, p. 245, 246, 270, 278, 288.

[8]"Appellate Jurisdiction" 7 COLUMBIA LAW REVIEW 248; "The Abuse of New Trials" 3 Michigan Law Review 257.

[9]32 N. Y. State Bar Association 32.

[10]34 N. Y. State Bar Association 354.

sociation of the City of New York. The two Committees worked together and agreed upon a bill which with some amendments was adopted by the Legislature and became a law on the first day of September. This effects such a radical change in procedure that it should be quoted at length. It amends section 1317 of the Code as follows:

"Section 1317. Judgment or order on appeal.

"Upon an appeal from a judgment or an order, the appellate division of the supreme court, or appellate term, to which the appeal is taken, may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing. When a trial has been before a jury, the judgment of the appellate court must be rendered either upon special findings of the jury or the general verdict, or upon a motion to dismiss the complaint or to direct a verdict. A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed. After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."[11]

This bill, if administered in the right spirit will accomplish two reforms of vital importance.

1. It does away with the multiplicity of new trials by directing the appellate court to render "final judgment upon the right of all or any of the parties." Where the case had been tried before a jury this judgment must be rendered, "* * * either upon special findings of the jury, or the general verdict, or upon a motion to dismiss the complaint or to direct a verdict. * * *" This clause was proposed by Senator Hinman and makes it necessary for a party to a jury trial who desires that the appellate court should render final judgment, either to procure special findings or to move to dismiss or to direct a verdict.

When special findings of the jury are made upon contested

[11]Laws N. Y. 1912, Ch. 380. In an opinion handed down November 7, 1912, in Bonnette *v.* Molloy, the Appellate Division, First Department, gave full effect to this amendment, modified the finding of fact made at Special Term, and rendered final judgment accordingly.

questions of fact, the appellate court can consider them in connection with the other facts appearing on the record, and render final judgment upon the right of the parties upon the facts thus appearing. If a motion is made to dismiss the complaint or to direct a verdict and either is denied or granted, the court on appeal can reverse the decision of the trial court and render its decision upon the merits. If for example, the court should be of opinion that the complaint should have been dismissed, it is directed to render judgment of dismissal.

If a motion to dismiss has been granted, and the court is of opinion that plaintiff was entitled to a verdict, it can order judgment accordingly. In such case it would have power to remit the action for an assessment of damages at trial term.

If the appellate court is of opinion that a verdict should have been directed, the court should render judgment as in its opinion the direction should have been given on the trial.

In short this act gives to the Appellate Division or Appellate Term of the Supreme Court the full power of the trial term. The lack of such a power, essential as it is to the speedy administration of justice, cost the litigants in *Reich* v. *Cochran*[12] twenty years of litigation. So in *Brady* v. *Cassidy*[13] the litigation lasted twelve years. All this time defendants had been in possession of goods sold them by plaintiff, for which they had never paid.

It will naturally be asked: How can the decision of the Appellate Division in such cases be reviewed in the Court of Appeals? This is provided by an amendment to section 1338 of the Code.

This also will be quoted in full:

"Section 1338. When reversal presumed not to be on a question of fact.

"Upon an appeal to the court of appeals from a judgment, reversing a judgment entered upon the report of a referee, upon the verdict of a jury or a decision, or a determination in the trial court; or from an order granting a new trial, upon such a reversal; it must be conclusively presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the particular question or questions of fact upon which the reversal was made or the new trial was granted are specified and referred to by number or other adequate designation in the body of the judgment or order appealed from."[14]

[12](1911) 201 N. Y. 450, 452.

[13](1895) 145 N. Y. 171.

[14]Laws N. Y. 1912, Ch. 361.

This act removed the limitation to which Justices of the Appellate Division have often called attention, that their Court had no power to find facts, but could only pass on findings below. It expressly directs them to specify in the judgment or order of reversal "the grounds of reversal upon a question of fact."

These findings thus specified form part of the record. As findings of fact, they are conclusive upon the Court of Appeals. Upon them that Court is authorized to render final judgment as it did in *Jackson* v. *Andrews*[15] and in other cases where the facts were found in final form.

Marcus T. Hun is entitled to great credit for the part he took in drawing and advocating this latter bill.

The amendments thus considered confer upon the Appellate Division the same power to review the decision of the court below and to render final judgment upon the merits that the United States Circuit Courts of Appeal have in equity and admiralty cases. This power has been exercised by them and their predecessors, in equity and admiralty cases, since the foundation of the government. It was the experience the author of this paper has had in the federal courts, which led him to be so strenuous in advocating legislation which should give to the State Court, sitting in the court house on Madison Square, the same power that is possessed by its sister court, sitting in City Hall Park. Can any one deny that the state courts should possess power as ample within their jurisdiction as the federal courts?

The difference between the powers of the federal and the state appellate courts in New York, prior to September 1, 1912, may be illustrated by the decisions in two cases of public importance.

The State of New York made a law that the maximum price for gas in the City of New York should be eighty-five cents per thousand feet. An action was brought in the United States Circuit Court to enjoin the enforcement of this law on the ground that it was confiscatory. Judge Lacombe decided that as matter of fact, this rate would not enable the Gas Company to earn a reasonable return for its invested capital. He therefore granted the relief asked. The Supreme Court of the United States, on appeal, reviewed this decision on the facts, reversed it, and sustained the constitutionality of the law.[16] This judgment affected

[15] (1874) 59 N. Y. 244.

[16] Willcox *v.* Consolidated Gas Co. (1908) 212 U. S. 19.

the welfare of over five million people. How unjust it would have been to make the decision of one man final on such a point.

Yet this is what the state practice in New York would have done prior to the amendment before quoted. It is true that the Appellate Division had power to reverse upon the facts. But in view of the ruling that under the Code, as it was, the Appellate Division had no power to decide what the facts were, but could only reverse and order a new trial, it became customary to treat the finding of the Trial Justice on the facts as conclusive, unless it was against the weight of evidence.

This may be seen from the report of *Christopher & Tenth St. R. R.* v. *Twenty-third St. Railway.*[17] The contract under adjudication in that case was of great pecuniary value, and affected the interest of millions of passengers. The decision of the trial judge upon the facts was held conclusive by the General Term, and by the Court of Appeals. The General Term intimated that it would have decided this question of fact differently; but it was again "powerless to redress." The power which was lacking is now restored, to the honor of the Court and the great advantage of the citizen.

And now let us call attention to another reform of great importance effected by the amendment of section 1317. It requires the appellate court to give judgment

"without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."

It is difficult to account for the adoption of a contrary rule. Goldwin Smith said of the acute and learned Baron Parke, who was largely responsible for the adoption of the technical rule of reversal referred to[18] that he cleverly reduced the law of England to an absurdity.

The Justices of the Appellate Division in their testimony before the Commission on the Laws Delay already cited, bore witness to the evils flowing from this technical and unjust decision. It has been abrogated in England by the Judicature Acts.[19] In the State of New York, so far as criminal cases are concerned, it was changed by section 542 of the Code of Criminal Procedure:

[17](1894) 78 Hun 462, aff'd. (1896) 149 N. Y. 51.

[18]Crease *v.* Barrett (1835) 1 C. M. & R. 918, 932.

[19]Note the language of Lord Chief Justice Coleridge in Reg. *v.* Gibson (1887) L. R. 18 Q. B. D. 537, 540.

"After hearing the appeal, the court must give judgment, without regard to technical error or defects or to exceptions which do not affect the substantial rights of the parties."

To this section the Court of Appeals gave a liberal construction in *People* v. *Strollo*.[20] The same section was construed in a very enlightening way in *People* v. *Wenzel*.[21] The Court after reviewing the evidence on the merits, as it is required to do by section 528 of the Code of Criminal Procedure, "when a judgment is of death," and finding that the evidence of guilt was satisfactory, held that error in the admission of improper testimony did not affect the substantial rights of the parties. The same ruling was made in a case of manslaughter.[22]

Even without legislation the present Court of Appeals has found a way to modify the rule that prejudice was to be presumed as the consequence of every error. In *Post* v. *Brooklyn Heights R. R.*, the Court said:

"There are errors in this record, but we find none calling for reversal, when the circumstances under which the erroneous rulings were made and their probable effect on the result are taken into account. Under our system of appeals every error does not require a new trial, for the vast judicial work of the State could not be done on that basis. Unless the error is so substantial as to raise a presumption of prejudice, it should be disregarded, for undue delay is a denial of justice. * * *"[23]

These decisions afford good ground for believing that the appellate courts will give a liberal construction to the act before quoted.[24] This would obviate the second objection which was taken by Ex-Judge Hatch to the proposition when presented to the Bar Association in 1909, that the judges would construe any such exactment so strictly as to deprive it of any force.

In conclusion let us point out that laws however carefully considered are ineffective, unless administered in the spirit of their

[20] (1908) 191 N. Y. 42, 61-67.

[21] (1907) 189 N. Y. 275.

[22] People *v.* Mallon 116 App. Div. 425, aff'd. (1907) 189 N. Y. 520.

[23] (1909) 195 N. Y. 62, 63.

[24] Wade *v.* City of Mt. Vernon (N. Y. 1909) 133 App. Div. 389; Brown *v.* Newell (N. Y. 1909) 132 App. Div. 548, aff'd. 200 N. Y., 501; Weibert *v.* Hanan (N. Y. 1910) 136 App. Div. 388, 392. In this case the court said: "The decision in this case seems so eminently just that the Court should not be astute to seek for grounds upon which to reverse this judgment. Unless an error upon a trial is so substantial as to raise a presumption of prejudice, it does not require a new trial and should be disregarded. * * * "

enactment. These laws have been enacted in response to a demand from the profession and the public. As has been shown, they have had ample discussion and careful consideration. If lawyers find that technical points,—"The fine, sharp quillets of the law"—are ineffective will they not cease to be taken? Men who respect their profession and desire the real good of their clients will realize that now a case should be fought out upon the merits.

The criminal courts of this State have ceased to be what Trollope called the English Criminal Courts of fifty years ago: a machine "for the manumission of murderers and the protection of the criminal classes." If these recent statutes are administered in the same liberal spirit, we shall be freed from the disgraceful spectacle of repeated reversals on technical points and repeated new trials, which decide nothing and operate as a premium to fraud and perjury.

Other States either by judicial action, as in Maine, Washington and New Hampshire, especially the latter; or by legislation, as in New Jersey, Ohio, Wisconsin, Kansas and California, have substantially adopted these reforms. In the latter State it was done by Constitutional Amendment in 1911. Unfortunately this applies only to criminal cases. Equity Rules, 19 and 22, just promulgated by the United States Supreme Court, apply to the Federal Equity practice the rule thus embodied in the New York Code. Let us hope that the federal courts in common law cases, and the state courts in all the States, will soon fall into line, and restore the United States to the position of a country in which justice is administered without delay, and causes are decided upon the merits.

EVERETT P. WHEELER.

NEW YORK.